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STATEMENT OF RICHARD BEN-VENISTE

I am a graduate of Columbia Law School (J.D. 1967) and Northwestern University Law School (L.L.M. 1968). I served as Assistant United States Attorney and Chief of the Special Prosecutions Section in the United States Attorneys Office for the Southern District of New York from 1968-1973. Thereafter, from 1973-1975, I served as Assistant Special Prosecutor and Chief of the Watergate Task Force under Archibald Cox and Leon Jaworski.

More recently, I served as Minority Chief Counsel to the Senate Whitewater Committee during 1995-1996. In addition, I have served as Special Counsel to the Senate Subcommittee on Government Operations at the request of former Senator Lawton Chiles, and as Special Counsel to the Senate Subcommittee on

District of Columbia Appropriations at the request of Senator Arlen Specter.

I have been engaged in the private practice of law continuously since 1975 and have represented clients in a wide variety of civil and criminal matters. In addition to serving as an assistant special prosecutor, I have also had the experience of defending a client who was found not guilty by a Washington, D.C. jury in a prosecution brought by Independent Counsel James McKay.

I am presently a partner in the Washington, D.C. office of Weil, Gotshal & Manges. Of course, my views stated before you are my personal opinions.

I am providing my observations and analysis – not as a witness to the events in question, but as one whose professional experience over the past thirty years may provide some perspective on the issues before you.

The first Watergate Special Prosecutor, Archibald Cox, was fired on the orders of President Richard M. Nixon when he refused to back down after subpoenaing Nixon's famously incriminating White House tape recordings. In response to the firestorm of public opinion following the "Saturday Night Massacre," President Nixon replaced Professor Cox with Leon Jaworski, a conservative Texan who vowed to continue the investigation with the independence and professionalism that had marked Cox's truncated turn at the helm. But by all accounts, Leon Jaworski made good on his promise, and today his record provides the model against which all high profile investigations and prosecutions are measured.

In Watergate, the serious abuses of power committed by the Nixon Administration resulted in the prosecution and conviction of numerous individuals who had held public office during Nixon's tenure, including two attorneys general, John Mitchell and Richard Kleindeinst; H.R. Halderman, the White House chief of staff; the

chief and deputy domestic advisors to the president, John Erlichman and Egil Krogh; Chuck Colson, a senior advisor to the president; the counsel to the president, John Dean; and others. Their offenses went directly to the abuse of the power of the president's office and the misuse of the CIA, the FBI, the IRS, and the FCC in violation of important rights of others. The obstruction of justice and perjury that was committed in furtherance of the Watergate cover-up was designed to shield higher-ups from detection while blaming everything on the lower level individuals who had been caught red-handed.

Upon his appointment, Mr. Jaworski immediately withdrew from his lucrative law practice and devoted himself entirely to his duties as Special Prosecutor. Even with President Nixon's unlawful firing of Archibald Cox, the Watergate cover-up case was investigated and prosecuted within 21 months of the creation of the Special Prosecutor's office.

The credibility of the Watergate Special Prosecutor's office was dependent upon the public's perception of our investigation as professional, impartial and fair. If we had leaked such explosively damaging evidence as President Nixon's taped instruction to continue the cover-up, or his admission regarding promises of presidential clemency to the Watergate burglars, it would not only have been unfair, it would have violated the law. No leaks occurred.

Mr. Starr has the unhappy distinction of being the first independent counsel to come under investigation for unethical and possibly illegal conduct. In addition to the 24 prima facie instances of improper leaks of grand jury material identified by Chief Judge Norma Holloway Johnson, there was the spin-leak of the Starr Referral itself in the days leading up to its actual transmittal. Mr. Starr's response to Rep. Zoe Lofgren's question as to whether he would release any journalists from promises of confidentiality – that it would be "unwise" for him to do so – may

well be true, but only serves to reinforce the basis for Judge Johnson's suspicions. In addition, the aggressive and disproportionate tactics employed by Starr's office, sometimes in violation of Department of Justice guidelines and bar association standards of professional responsibility, have left the public with a justifiable perception that Mr. Starr has conducted more of a crusade than an investigation – with the political objective of driving President Clinton from office, rather than uncovering criminal activity.

Leon Jaworski took extraordinary care not to intrude beyond the proper boundaries of his office. Mr. Jaworski would be the last person to suggest that an attempt to pierce the president's attorney-client privilege, or to interfere with the time-honored protective function of the Secret Service, could be justified as an appropriate exercise of prosecutorial discretion – no matter what a court might ultimately rule.

Even twenty-five years ago, it was the practice of federal prosecutors not to subpoena the target of a grand jury investigation. On the other hand, it was considered unfair to deprive a target of the opportunity to testify if he so desired. Accordingly, Mr. Jaworski extended an invitation to President Nixon to testify before the grand jury. When Mr. Nixon declined, Jaworski did not publicize the exchange – because to do so would have been an unfair comment on Nixon's decision not to testify. Again, there was no leak.

By comparison, Mr. Starr has aggressively pursued every opportunity to push the limits of legal boundaries – irrespective of the relatively minor significance of the subject matter of his inquiry, when compared to offenses that might involve misconduct of constitutional dimension.

Mr. Jaworski recognized that he had a responsibility to transmit to Congress important evidence bearing on the House Judiciary Committee's ongoing impeachment inquiry. At the same

time, he was careful not to encroach upon Congress' constitutional function of evaluating evidence and determining whether impeachment was warranted. Because the evidence was obtained through grand jury subpoenas, Mr. Jaworski first sought the grand jury's approval and then sought permission from chief Judge Sirica to transmit the material as an exception to Rule 6(e), which would otherwise prohibit its dissemination outside the grand jury. Judge Sirica reviewed the proposed transmittal and found:

> "It renders no moral or social judgments. The Report is a simple and straightforward compilation of information gathered by the Grand Jury, and no more. . . . The Grand Jury has obviously taken care to assure that its Report contains no objectionable features, and has throughout acted in the interests of fairness. The Grand Jury having thus respected its own limitations and the rights of others, the Court ought to respect the Jury's exercise of its

prerogatives." In re Report & Recommendation, 370 F. Supp. 1219, 1226 (D.D.C. 1974).

At the same time, Mr. Jaworski did not inform the House that the grand jury had voted to authorize him to name Mr. Nixon as an unindicted co-conspirator in the upcoming Watergate cover-up trial. While the grand jury's action provided insight into its view of the evidence, its decision was not evidence. Again, this explosive information was never leaked.

By comparison, Mr. Starr never submitted his proposed referral to Chief Judge Johnson for advance review, nor did he ask the grand jury to pass on its contents. Instead, we are told, he sought and received carte blanche permission from the three judge special court which first appointed him to disseminate such information to the House as he deemed appropriate. Thus, no one but Starr and his subordinates reviewed the aggressively accusatory and gratuitously salacious referral before it was transmitted to the Judiciary Committee. Against the advice of his

ethics advisor, Mr. Starr agreed to act as chief advocate for impeachment as a witness before this Committee. Professor Dash resigned in protest, accusing Mr. Starr of violating his statutory obligations and unlawfully intruding on the House of Representatives' exclusive power of impeachment.

For some time I have been concerned about the lack of proportionality that has characterized Mr. Starr's investigation, and now this Committee's inquiry. I believe Chairman Hyde stated at the outset, in substance, that unless the public perceived this Committee's efforts as bipartisan, it would lack the credibility to bring articles of impeachment to the floor. In my view, the inability to find a bipartisan consensus in this Committee is rooted in the wide gulf between the President's conduct – even assuming all the factual allegations against him were to be proved – and the grave consequences of a vote of impeachment.

While I do not condone the President's conduct in engaging in his relationship with Ms. Lewinsky, or in the way he dealt with

that issue in the Paula Jones deposition, it is clear to me that attempting to criminalize that conduct, much less make it the basis of articles of impeachment would do a disservice to the Constitution and any notion of proportionality, moderation and common sense.

Terms like "perjury" and "obstruction of justice" are constantly repeated before this Committee without regard for the context of the conduct. There was no lying about anything to do with disloyalty to the United States, or bribery or using the vast powers of federal agencies to inflict pain or embarrassment upon political or personal adversaries. Clearly, Mr. Clinton attempted to obfuscate something which his adversaries already knew – that he had engaged in an improper physical relationship with a young intern. His testimony in that civil deposition did not change the result in the Paula Jones civil suit. The court ruled that evidence about Ms. Lewinsky was too remote to be included in any trial, and then dismissed the suit altogether on other grounds. Ironically, Mr.

Clinton's deposition testimony about Ms. Lewinsky is probably responsible for the fact that the case was settled in the amount it was.

And as to Mr. Clinton's testimony before the grand jury, is it not clear that Mr. Starr's purpose in forcing Mr. Clinton to testify was simply to provide additional fodder for an impeachment referral? What interest would a federal grand jury have in investigating whether one consenting adult touched another consenting adult here, there or anywhere, or whether the conduct first occurred in November or January, or whether Mr. Clinton and Ms. Lewinsky exchanged six or twelve or twenty-four gifts? Moreover, Mr. Clinton acknowledged having engaged in this reckless and inappropriate physical relationship, and apologized for having misled everyone about it.

Yes, I agree that there has been too much hair splitting and parsing of language by the President – but surely this cannot be the reason the House of Representatives tells the American public who

twice elected Bill Clinton – and the world – that our President should be removed.

And turning to claims of obstruction of justice, has this Committee asked the basic question – who was obstructed and how were they obstructed? Who did not learn what they needed to know; what injustice was perpetrated and on whom and to what result? These are not rhetorical questions – although I believe we all know the answers. These are questions that any serious or fair decisionmaker would want answered, because they go directly to the heart of the evaluation of the conduct in question.

What we do know is that the two supposed grounds for an obstruction of justice charge – Vernon Jordan's attempt to find a job for Ms. Lewinsky and the "talking points" memorandum given Ms. Tripp by Ms. Lewinsky – which formed the basis for Mr. Starr's request to Attorney General Reno that his authority to investigate be expanded – are both dead letters. And Mr. Starr

knew that before he called President Clinton as a grand jury witness.

I believe this Committee has not inquired sufficiently into the potential for mischief in misusing the powers of the Independent Counsel statute to exaggerate and skew an investigation.

I believe the Committee still has the opportunity to clarify the important distinction between what may be a prosecutable offense and what can be considered an impeachable offense. To clarify that the meaning of the expression "no man is above the law" had to do with whether the President, like anyone else must provide relevant evidence if subpoenaed – not whether the President must be impeached for any offense, like shoplifting or tax evasion, simply because other individuals may be prosecuted for similar conduct. The President also may be prosecuted for criminal conduct – the Constitution so provides – but such prosecution must be delayed until the President leaves office.

This process has suffered from too much partisanship, too much hypocrisy, too much sensationalism and too little time for reflection.

Why has there been this sense of rush to judgment? Why hasn't there been the kind of full examination in pre-hearing depositions or executive sessions of the investigation which has been presented to you in a very one-sided and adversarial way by Mr. Starr? Does not the momentousness of the issues before this Committee demand nothing less than a complete and thorough inquiry? Or will impeachment become still another arrow in the quiver of the warrior class of ever more truculent partisan politicians in Washington? If this is so, we will never see an end to the gamesmanship of "gotcha" and "payback" that has already taken civility and comity hostage within these hallowed halls.

I believe the American public has long ago tired of this partisan warfare, and not surprisingly so – there is much for

government to do of a constructive nature in addressing the real life problems and challenges we face together as a nation.

On August 28, 1998, in an opinion piece published in the Washington Post, I suggested that the appropriate resolution of the Lewinsky matter was for a group of respected leaders to come forward and propose a Congressional resolution of reprimand to deal with Mr. Clinton's reckless and improper personal conduct. It appears that such a group has begun to coalesce. Former President Gerald Ford, Sen. Joseph Lieberman, Sen. John Kerry, Rep. Peter King, and Rep. Martin Frost are among a bipartisan number of such leaders who, while unambiguously critical of the President's conduct, recognize that respect for the momentousness of the constitutional remedy of impeachment, and appreciation of a common sense application of proportionality to the offensive conduct, make a resolution of censure the appropriate result. Such a resolution, not impeachment, will give voice to the public's will in retaining their twice-elected President's services, while

expressing firm disapproval of his private conduct. In my view, such a resolution would be consistent with the obligations of the House of Representatives and in the best interests of our nation.

Richard Ben-Veniste

The Perfect President

Personally, I haven't seen one yet, although Harry S. Truman, the first president I remember, came close. Steadfast, honorable and solid, Truman rose above his modest résumé and guided us through the end of World War II and into the postwar period. Imagine what Truman's presidency would have been like if he had had an independent counsel on his tail for four years, examining his old ties to the Pendergast political machine in Missouri.

The independent counsel statute has become so skewed in its application that there is little doubt about its demise next year. A law rooted in the historical fact of a president, his highest aides and his attorney general criminally abusing the powers of the presidency has been misused to sanction a largely political fishing expedition. For more than four years Kenneth Starr has trolled through the waters of President Clinton's life, dating back to when he first entered politics two decades ago. The scope of that inquiry and the zealousness with which it has been conducted—unprecedented in its intrusiveness—was nevertheless unavailing in producing evidence of impropriety by Mr. Clinton, much less illegality.

But before the imminent collapse of his investigation, Starr seized upon the Paula Jones case to resuscitate his quest. The Supreme Court—in a decision now shown to have been naive in the extreme—ruled that it would not be overly intrusive on a president's official duties for him to comply with pretrial discovery in a civil case about matters antedating his term of office.

The Paula Jones case is the Cheshire cat in the current imbroglio. The case has disappeared, thanks to Judge Susan Webber Wright's ruling (although it periodically threatens to reappear). All that is left is the mischief of pretrial deposition answers by the president when he walked into the Tripp/Jones/Starr ambush.

More important than Webber Wright's dismissal, however, was her finding that the Lewinsky matter was not essential to the core issues in Jones's complaint and could not be part of the case if it went forward. Thus, it can be reasoned, if the president had refused to answer the questions put forward on that topic instead of answering, the judge eventually would have reached the same conclusion. All the recent hyperbole about obstruction of justice (precisely *who* was obstructed, and *how*, one ought to ask) would have been avoided. But the president's reckless indiscretion and

In any rational system, the punishment should be proportionate to the offense. Yes, it was offensive for President Clinton to engage in a physical relationship with a White House intern. And, yes, it was offensive that the president failed to acknowledge the relationship candidly when the issue first arose, thereby causing all sorts of collateral problems while he temporized with denials.

We don't need to hear any more of the lurid details.

But a prolonged period of torturing Bill Clinton will serve no purpose other than a narrow political one. In the meantime, the national interest will most assuredly be harmed, as the events over the past few weeks in Africa and Afghanistan only preview. The collision between an implacable and overzealous independent counsel and an imperfect and proud president should not be allowed to escalate further into extended hearings, filling in the lurid details about what we already know. It is now up to those with the stature and commitment to the national interest to rise above partisan politics and bring closure to this lamentable episode.

Perhaps Kenneth Starr will act to rescue his damaged reputation by assuming the role of statesman/prosecutor and decline to send a report to the House, acknowledging that the Framers had only official acts of misconduct in mind when they drafted the impeachment clause in Article II of the Constitution. Perhaps pigs will fly.

Only slightly less unlikely is the possibility that a group of respected leaders will appear on the scene as a collective deus ex machina. They will put things right again in the nation by proclaiming that Congress should pass a resolution reprimanding the president for his inappropriate relationship with a White House intern, and for lack of candor in his civil deposition and over the several-month period thereafter. And let the legitimate business of government go forward.

The alternative scenario—going through the full circus of leaked Starr report, report, further leaks, airing of Tripp tapes, sanctimonious declamations, counterstrikes regarding sexual hypocrisy, all brought to us nonstop, in color, 24 hours a day, for all the

The Case Against Ken Starr

By Richard Ben-Veniste

WASHINGTON

Did Kenneth Starr know that Linda Tripp had tape-recorded her phone conversations with Monica Lewinsky weeks before Jan. 12, the date when he said he first learned of the tapes? If he did, the implications would be significant.

A flurry of recent news reports has revealed that disclosures about Ms. Tripp's activities were made to Mr. Starr's office in the week before Jan. 12. While important, these revelations may be but a part of a more serious chain of events dating from last year.

Ms. Tripp began recording her conversations with Ms. Lewinsky in the fall of 1997. When she consulted her lawyer in December, he apparently

Interconnected lawyers, intriguing questions.

told her that the taping was illegal under Maryland law, according to an Associated Press report several months ago. Ms. Tripp's adviser and literary agent, Lucianne Goldberg, told A.P. that Ms. Tripp then "panicked" and sought a new lawyer who could get her immunity. According to The Washington Post, Ms. Goldberg and other allies of Ms. Tripp soon approached several politically conservative lawyers known to be supporters of Mr. Starr, including Theodore Olson, an Assistant Attorney General in the Reagan Administration and a close friend of Mr. Starr's.

If this information is correct, a case could be made that Mr. Starr's allies had the opportunity to pass along information to him that President Clinton had engaged in an illicit relationship with a young intern, who had been captured on tape admitting the affair to a "friend" who would be seeking immunity from prosecution. Why would these lawyers have kept this information from Mr. Starr?

Revelations in Mr. Starr's report to Congress and supporting documents, together with recent investigative news reports, are consistent with the hypothesis that Mr. Starr knew about the tapes much earlier than he has admitted.

For example, The Los Angeles Times has reported that Ms. Tripp was in contact with David Pyke, a lawyer for Paula Jones, about Ms. Lewinsky as early as Nov. 21, 1997. And Gilbert K. Davis, a lawyer who represented Ms. Jones until September 1997, has now acknowledged that the Jones team repeatedly sought advice on the case from Theodore Olson. Mr. Olson has also represented David Hale, Mr. Starr's main witness in the Whitewater-related trial

Paula Jones sexual-harassment case. Is it plausible that there was no cross-pollination of this information between Mr. Starr's confidants and Ms. Jones's extended legal family? After all, there would be no better way to "criminalize" the President's improper personal behavior than to have him ambushed in a perjury trap.

Those who are skeptical that there was a working relationship between the Starr and Jones camps must ask how it could be that the independent counsel's deputies could confront Ms. Lewinsky for the first time on Jan. 16 armed with knowledge that her lawyer had submitted a false affidavit in the Jones case. According to the Starr report, while the affidavit had already been sent to the Jones lawyers by Jan. 16, the judge in the case, Susan Webber Wright, didn't get it until the next day.

If Mr. Starr knew of the tapes weeks before he has acknowledged, it would mean that he deceived Attorney General Janet Reno when he explained the chronology of events to her on Jan. 15 in his feverish bid to expand his jurisdictional mandate to include Ms. Lewinsky. So too would Mr. Starr's report to the House be tainted by a fundamental misrepresentation of the facts.

If Mr. Starr did not tell the entire truth, what might have motivated him? To find the answer, the House Judiciary Committee should investigate to what extent surrogates for Mr. Starr may have provided an unseen hand, directing Ms. Tripp in her manipulation of Monica Lewinsky. Mr. Starr's justification for investigating the Lewinsky matter — possible obstruction of justice involving Vernon Jordan — now appears to be a scenario entirely scripted by Ms. Tripp.

Indeed, according to Ms. Lewinsky's testimony, it was not until Jan. 9, just a week before Mr. Clinton's deposition in the Jones case, that Ms. Tripp introduced the notion that Mr. Jordan find a new job for the former intern as a quid pro quo for Ms. Lewinsky's denial that she had sexual relations with Mr. Clinton. Similarly, the talking points memorandum has now been debunked as an interactive project between Ms. Tripp and Ms. Lewinsky.

In short, we need to find out what caused Ms. Tripp to appear to focus her efforts on trying to coax Monica Lewinsky and others into the *appearance* of obstructing justice — a far stretch from her earlier efforts to get Ms. Lewinsky to talk about details of her improper relationship with the President.

The Starr report raises new questions about the conduct of the grand jury investigation. According to the report, Lucianne Goldberg was not called to testify before the grand jury. It seems curious that Mr. Starr would not call the person who admittedly encouraged Ms. Tripp to tape the phone calls and who was apparently involved in Ms. Tripp's every step if his sole interest was, as he has claimed, "getting the truth."

Another mystery is what has become of the tapes that Ms. Goldberg told the F.B.I. she made of her conver-

her on the evening of Jan. 16, it prevented her lawyer from having the opportunity to withdraw her affidavit before it was filed with the court.

Much of the public's resistance to the claimed gravity of the Starr report is found in the common-sense realization that Mr. Starr's quest to "get" President Clinton at all costs goes against our basic sense of justice and fair play. Mr. Starr is now himself the subject of an investigation by Judge Norma Holloway Johnson of the United States District Court into alleged improper leaks of grand jury material.

The Justice Department and Judiciary Committee should investigate whether Mr. Starr misrepresented the facts about his knowledge of Ms. Tripp's tapes. If he did, it would be time to consider his removal and a reassessment of his charges against the President. □